STATE OF MICHIGAN

COURT OF APPEALS

UPPER LONG LAKE ESTATES ASSOCIATION, Plaintiff-Appellee,	UNPUBLISHED June 28, 2005
V MICHAEL SCHEID, Defendant-Appellant.	No. 253234 Oakland Circuit Court LC No. 02-043501-CH

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals by right the trial court's order granting summary disposition in favor of plaintiff and the granting of plaintiff's request for a permanent injunction. As a result, defendant must remove the garage addition he built in violation of his deed restrictions. We affirm.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*., at 278. When deciding a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party to determine if there is a genuine issue of material fact for trial. *Id*. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court also reviews de novo equitable actions. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

The parties do not dispute the basic facts. Defendant's property is located in the Upper Long Lake Estates subdivision in Bloomfield township. Section II, ¶ (b), of the subdivision's deed restrictions requires structures placed on property within its boundaries to be set back forty feet from the road lot line. Because defendant's property is a corner lot that abuts two roads, all structures must be set back forty-foot from each road.

Plaintiff is a nonprofit corporation responsible for enforcing the deed restrictions. Defendant desired to build an addition onto his two-car garage and submitted several plans to

plaintiff in accordance with the procedure outlined in § I, ¶ (b) of the deed restrictions. Plaintiff rejected defendant's plans, the last of which contemplated a twenty-one foot encroachment into the setback from one of the roads that abuts the property.[1] Nevertheless, defendant applied for and received a setback variance from the township's zoning board. Defendant was then granted a building permit. After plaintiff was informed of these actions, it immediately filed suit. By the time plaintiff's motion for summary disposition was heard, defendant had built his garage addition.

Public policy favors use restrictions in residential deeds. *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1983). Michigan courts generally enforce valid deed restrictions through injunction. *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957). There are three equitable exceptions to the general enforcement rule: (1) technical violations and absence of substantial injury, (2) changed conditions, and (3) limitations and laches. *Id*. Defendant does not contest the validity of the restrictions; rather, he asserts that he is entitled to equitable relief because the first exception applies here. In *Webb, supra* at 211, this Court stated:

> Because no Michigan court has defined a "technical violation" in this context, we adopt the definition in *Camelot Citizens Ass'n v Stevens*, 329 So2d 847 (La App, 1976), which characterized a technical violation of a negative covenant as a "slight deviation" or a violation that "'can in no wise, we think, add to or take from the objects and purposes of the general scheme of development . . . .'" *Id*. at 850 (citation omitted).

Defendant emphasizes the second portion of the definition and argues that his addition's encroachment is a mere technical violation because it does not contravene the stated purposes of the general development plan of the subdivision. Defendant presents arguments regarding why, in his opinion and even those of a few neighbors, his addition complements the general plan. We conclude that defendant's interpretation of the definition adopted in *Webb* misses the mark.

In *Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512; 686 NW2d 506 (2004), this Court recently held that the defendants' construction of a deck without prior approval from the plaintiff was *not* a technical violation. The defendants submitted plans to plaintiff for approval, but plaintiff rejected the plans because the specifications provided for connecting the deck railing directly to the deck floor. Plaintiff required a clearance of some inches between the bottom of the railing and the deck floor. *Id*. at 514-515. Despite their plans being rejected the defendants' constructed their deck. *Id*. at 515. The defendants' property was subject to certain restrictive covenants, two of which addressed architectural controls established "'to promote an attractive, harmonious residential development having continuing appeal.'" *Id*. at 516. Thus, no structure could be erected without plaintiff's prior approval.

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[1] The plan also contemplated a two-foot encroachment on the setback from the other road, but, plaintiff's complaint did not focus on this encroachment.

The trial court found that the defendants had breached the covenants, but found the breach to be a "technical violation" that imposed no substantial injury on the plaintiff. *Id*. Reversing, this Court held that because there was a clear breach, it could be enjoined. *Id*. The defendants could have argued, and perhaps did, that the deck as built did not contravene the purposes of the covenants pertaining to architectural controls. But it was sufficient for this Court to find that the breach was *not* merely technical when the defendants built the deck without obtaining the plaintiff's prior approval, and the express language of the covenants vested plaintiff with the sole authority to decide what types and designs of structures would comply with the restrictive covenants.

Similarly, in this case, defendant both ignored the setback requirement at issue and built his garage addition without plaintiff's approval. Indeed, it had disapproved his plans. Defendant suggests that except for the setback encroachment, the addition is consistent with the subdivision's general development plan purposes outlined in § I, ¶ (a), of the deed restrictions. But whether the degree of the setback violation is consistent with these purposes is a decision solely for plaintiff to make. Because the by-laws of the association vest this sole authority with plaintiff, defendant's building a structure in complete defiance of plaintiff's express disapproval "take[s] away from the objects and purposes of the general scheme of development."

Furthermore, reasonable minds could not differ in concluding that a twenty-one foot encroachment on a forty-foot setback cannot be construed a "slight deviation." In *Camelot, supra*, the case from which this Court in *Webb* adopted the definition of "technical violation," the court held that a five-foot encroachment on a thirty-foot setback was a slight deviation. *Camelot, supra* at 849-850. Here, the encroachment at issue covers more than half of the required setback.

The exception affords equitable relief for technical violations only where there is an "absence of substantial injury." *Cooper, supra* at 530. Because the violations were not technical, we need not determine if they caused substantial injury. Accordingly, we hold that because defendant built his garage without plaintiff's approval, as required by the deed restrictions and in violation of the setback requirement, the trial court properly granted plaintiff summary disposition.[2]

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[2] We reject defendant's argument that the trial court did not consider the particular facts and circumstances of this case when addressing the "technical violation exception." The trial court noted the overall setback requirement and the amount of the encroachment. That the trial court first stated in its opinion that it did not "find equitable grounds on which to refuse to enforce this otherwise valid deed restriction" and then stated that it found that the addition was not a technical violation does not indicate that the trial court did not employ the proper analytical framework.

We also reject defendant's argument that the trial court's discussion of waiver affected its analysis of the "technical violation" exception. The trial court sufficiently explained its reasoning for finding that there was not merely a technical violation. Although the trial court did not need to determine the waiver issue because defendant conceded that this exception was not

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Defendant also argues that it would be inequitable to impose an injunction here where other homes in the area violate the setback requirement, and it would be unfair to allow plaintiff to selectively enforce the deed restriction. Despite defendant's attempt to couch this argument in terms of "balancing the equities," plaintiff is correct that defendant is simply arguing a waiver.[3] Defendant expressly stated in the trial court, as he does on appeal, that he is not arguing a waiver. That he referred to waiver in terms of changed conditions rather than waiver as the result of abandonment of the setback requirement in the deed restrictions is of no consequence. The law does not separate the concept of waiver as such. "Abandonment of restrictions by permitted violations and resultant change of character of the neighborhood amounts to a waiver." *Margolis v Wilson Oil Corp*, 342 Mich 600, 603; 70 NW2d 811 (1955); see also *Rofe, supra* at 155-156; *Parcells v Burton*, 20 Mich App 457, 462; 174 NW2d 151 (1969).

We affirm.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray

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applicable, the trial court's discussion did not adversely affect defendant.

[3] To the extent that defendant argues that plaintiff should be estopped from enforcing the setback variance because of its own conduct, we note that defendant only presented evidence of two homes in defendant's subdivision, lots 75 and 79, where plaintiff granted a variance. The first variance was necessitated by a township zoning ordinance and the footprint of the home remained unchanged. On lot 79, the homeowners had proposed plans that would have aligned the home with its neighbors and meet the setback requirement. But defendant, who was a member of plaintiff's board, objected to the home's location because his view from his own home would be obstructed. Contrary to defendant's assertion, it appears that plaintiff had the authority to grant variances in exceptional circumstances under § III, ¶ (i), of the deed restrictions. Because the road that abutted lot 79 was extraordinarily wide, a variance was granted. Defendant did not prove any other violations and the measurements he provided were not taken from the road lot line as required; consequently, they were inaccurate.